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INSTRUCTIONS TO THE JURY.

“’Tis the sport to have the engineer hoist with his own petard.”

Among the many pitfalls of trial practice yawning for both the young and the old practitioner in the two Virginias, it is doubtful whether there is any which engulfs more, and results in so many reversals of our *nisi prius* courts as that of special instructions to the jury. Our system is based upon the simple yet beautiful theory, of the learned trial judge, by concise and clear instructions, relieving the untrained jury from the complications and intricacies of law involved, and leaving them to determine merely disputed questions of fact, to which the law as announced by the court applies, and a just judgment naturally and inevitably results. In practice, however, it is undeniable that the spectacle, at the conclusion of a long and complicated jury trial, extending over days or weeks and in some instances over months, of astute counsel on either side presenting to the trial judge from one to a dozen or more written instructions, bearing upon every phase of the law and the evidence which has arisen during the trial, upon which instructions the trial judge usually immediately passes before the jury retires, frequently without argument, and usually with brief and unsatisfactory argument, is rather suggestive to the profession of the fowler laying his snares. Usual some of the instructions have been anticipated and prepared with more or less care by counsel in their offices, but it is seldom that the trial and progress of the case does not adduce phases which require additional instructions, which are hastily written out at the trial table, amid the murmur, discussion and disorder which ordinarily attend the closing of a case. Let, however, a single correct instruction offered be refused, a single incorrect instruction be granted, an instruction deal too familiarly with the evidence or so much as squint at its weight, be granted; or be “abstract” and deal with points not fairly presented by competent evidence, or be refused as being abstract when the slightest evidence has tended to.

support its hypothesis, and the chances are that the entire trial, with all the preparation, costs, expense, hopes, fears, disappointment and joy which the procuring of the verdict and judgment may have entailed, will be rendered a nullity and the case reversed and remanded by an appellate court, because in the eyes of the law the cause of the disappointed litigant could not have failed to be prejudiced by the granting or the refusal of that instruction. Months afterward, embodied in cold type, each of these instructions now being granted or refused is scrutinized, weighed, tested, dissected, and subjected to an almost microscopic analysis—passed through the retort of all decisions that complete libraries can furnish—and woe to the instructions or ruling that stands not the test. “ ’Tis not as deep as a well, nor as wide as a church door, but ’tis enough—’twill serve.” A word too much or too little, and the murderer emerges from the death cell and goes rejoicing to another trial, where the same chances again attend him, or the weary and disappointed litigants in civil cases go back to the beginning of their controversies with no change in their respective conditions, except a financial one, or that induced by advancing years with the alternative of again fighting it out, compromising, or dying of old age.

When it is considered that the jury have had these instructions read to them but once, usually at the close of the argument, and that frequently such instructions teem, more or less necessarily, with technical expressions from legal, medical and other professions, possibly heard by the jurors for the first time, and that the jury are not permitted, even should they startle counsel by requesting it, to take the instructions with them to the jury room to examine their meaning, application and effect, the humor of the situation increases. It is believed that observation of a jury—an average, fairly intelligent jury—during the reading to them of the instructions, say in an ejectment case, will show that there is at least a chance that some of them do not hear the important portions at all; an additional chance that they forget the portions heard before reaching the jury room, and a practical certainty that some of them wholly fail to understand another portion of what they may have both heard and remembered.

In many cases, however, instructions are vital and determine the case. In others they practically do so, and in still others are of such a character as to be readily understood by and largely to influence the jury in its determination. Here they are of course essential, and should be prayerfully offered. It is merely desired in this note to

point out a few of the dangers of over-instructing a good case, and it is not meant by these comments to assert that the practice of a "general charge" or "summing up" which prevails in many States is preferable to our own practice, for with us the court at least has the benefit of counsel's work and research as a basis to guide it.

As to form of instructions, we are told that an instruction in form "if the jury believe to a moral certainty and beyond a reasonable doubt," etc., in a criminal case is fatally erroneous on writ of error as failing to instruct that such belief must be "from the evidence."¹ In the case cited the court says that instructions must not be so drawn as to leave it open for the jury to found their belief upon anything but the evidence. It would have seemed that their oath as jurors, to "a true verdict render according to the evidence," would have been sufficient to rebut the presumption that they did so upon other grounds, even if such presumption would naturally have arisen otherwise.

Not only form, but the accent and manner of the trial judge in delivering his instructions may serve to render it erroneous. In *State v. Kerns*, 47 W. Va. 266, the Supreme Court of Appeals of West Virginia, apparently decide in the opinion (whatever the opinion may have intended to decide), that there is a legal presumption that such manner and accent were improper. In that case as the jury was about to retire to the jury room, the trial judge instructed, in substance, that under the indictment they could find the prisoner guilty of murder in either the first or second degree, and that if they found him guilty of murder in the first degree they should further find the punishment, namely, death or imprisonment for life.

Counsel for the defendant then suggested that he should also say to the jury that they could find the prisoner not guilty. Thereupon the court said: "Of course, gentlemen, you could find the prisoner not guilty at all if you thought the evidence justified such a finding, but in all your findings you must be governed by the evidence." Judge Dent, in the opinion of the appellate court, says: "Manner and accent can not be made part of the record, and such language uttered at the time it was could be made very suggestive to the jury—at least from which they could draw their own inferences as to the opinion entertained by the court." The record containing nothing whatever in the way of objection or exception to any actual impropriety in the "accent and manner" of the trial judge, and the opinion negating the idea that this language was in any way improper of itself, the

¹ *State v. Shepherd*, W. Va. 39 S. E. 686.

opinion necessarily must have been reached by the assumption as a matter of law that the manner was improper. While this case was reversed, however, Judges Brannon and McWhorter dissented from this portion of the opinion.

An instruction assuming any material fact to be true, the truth of which is not conceded, and predicated upon such assumption, is always reversible error.¹ This rule is based upon the legal sanctity of the jurors' province in regard to all questions of fact, and any, even the slightest, infringement on such province by the court is most jealously guarded against by the decisions of Virginia and West Virginia, and it is error for the court to instruct as to weight, efficiency, or inferences to be drawn from evidence, or as to the credibility of witnesses.² The rule is the same in civil and criminal cases, and decisions following and illustrating this rule are exceedingly numerous, and in many instances the distinctions drawn therein between comments on admissibility and effect of evidence, on the one hand, and its weight, on the other, are very finely drawn.

An instance of the extent to which this rule may be carried in a criminal case is found in the case of *State v. Dickey*, 46 W. Va. 319, which was an indictment for murder. The defence introduced evidence tending to show that just before the accused struck the fatal blow he was felled to the ground by a rock in the hands of the deceased. The State introduced evidence tending to show that no such occurrence took place, but that the fatal blow was given upon very slight oral provocation. The lower court instructed the jury that "if the prisoner with a deadly weapon in his possession without any or upon very slight provocation gives to another a mortal wound, the prisoner is *prima facie* guilty of wilful, deliberate and premeditated killing." *Held* error, apparently because this instruction tacitly implied that there was no provocation, or very slight provocation—a deduction difficult to follow, and wholly unsupported by either the law laid down or the facts involved in the case of *Boswell v. Commonwealth*, 20 Gratt. 860, cited in its support.

The converse of the proposition that it is error to assume in an instruction that any fact is proven, is also true, and hence it is error

¹ *State v. Allen*, 45 W. Va. 75.

² *Hopkins v. Richardson*, 9 Gratt. 486; *Davis v. Miller*, 18 Gratt. 1; *Taylor v. R. R. Co.*, 88 Va. 389; *Keel v. Herbert*, 1 Wash. 203; *De Jarnette's Case*, 75 Va. 857; *State v. Allen*, 45 W. Va. 75; *State v. Greer*, 22 W. Va. 801; *State v. Thompson*, 21 W. Va. 741; *State v. Hurst*, 11 W. Va. 75; *Dickielshild v. Bank*, 28 W. Va. 341; *State v. Kerns*, 47 W. Va. 286; *State v. Musgrove*, 43 W. Va. 672.

to assume any fact as not proven when there is any evidence, though very slight, tending to prove it.¹

A party is entitled to have his instructions given in his own language, if correct,² but it is frequently stated that if not correct as offered the court need not modify it and grant it as modified.³ The latter proposition is subject, however, to a qualification which practically destroys its effect, namely, that where the jury may be misled by its total rejection the court must modify and grant as modified,⁴ and this is especially true where the instruction asked is refused because of ambiguity in its language and where it is correct upon one construction.⁵

The effect of an incorrect instruction granted, or of the refusal of an applicable and correct instruction, is practically the same in Virginia and West Virginia. Its language as announced in numerous decisions of both States is probably somewhat stricter in Virginia, and in the earlier cases of that State it is held that, where an erroneous instruction is given the appellate court cannot undertake to determine that the verdict, notwithstanding such instruction, is right upon the evidence, and therefore affirm the judgment, but that it will be presumed to have affected the verdict, and the judgment must be reversed for a new trial.⁶

In the later cases, however, of which there are many, the rule is usually stated to be that an erroneous instruction will not cause reversal where the court can see from the whole record that under correct instructions a different verdict could not have been rightly found, or that the exceptant could not have been prejudiced by the instructions given or by the refusal of those rejected.⁷ In West Virginia the court has always refused to reverse for error in instructions where the whole record showed no prejudice,⁸ and the rule is stated and reiterated in almost the same language as the Virginia decisions except in one of the early cases,⁹ wherein it is apparently limited to cases where it is

¹ *Bentley v. Insurance Co.*, 40 W. Va. 730.

² *Jordon v. City of Benwood*, 42 W. Va. 312; *Bertha Co. v. Martin*, 93 Va. 805.

³ *Shrewbury v. Tufts*, 41 W. Va. 212; *State v. Caddle*, 35 W. Va. 73; *Gas Co. v. Wheeling*, 8 W. Va. 320.

⁴ *Ward v. Churn*, 18 Gratt. 816; *Institute v. McVey*, 84 Va. 41.

⁵ *Carrico v. R. R. Co.*, 35 W. Va. 391.

⁶ *Wiley v. Givens*, 6 Gratt. 277; *Rea v. Trotter*, 26 Gratt. 586.

⁷ *Jackson's Case*, 96 Va. 732.

⁸ *Clay v. Robinson*, 7 W. Va. 348; *Strader v. Goff*, 6 W. Va. 51; *Beatty v. R. R. Co.*, 6 W. Va. 388; *Dingess v. Branson*, 14 W. Va. 100; *Osborne v. Francis*, 38 W. Va. 312; *McKelvey v. R. R. Co.*, 35 W. Va. 500.

⁹ *Academy v. Rusk*, 8 W. Va. 373.

apparent from "documentary evidence and facts not controverted," and not from the "whole record," that the same result must have been reached regardless of the instruction.

It is well settled that it is not error to refuse to grant "abstract" or hypothetical instructions not based upon evidence before the jury. The instructions must go "to the law and to the testimony" presented in the case only, and instructions beyond that, however correct as legal propositions, are errors which may, and frequently do, mislead the jury by creating the impression that there is legal evidence before them tending to prove the state of facts as to which such instructions relate. Here at least, therefore, would seem to be a Scylla which the legal navigator could easily avoid and against which the trial judge need not rush; but directly across an exceedingly narrow channel looms Charybdis, based upon the decisions defining what evidence is sufficient to present a point before the jury and warrant an instruction as to its effect, should the jury deem such point proven in fact. In Virginia, any competent evidence, however slight, tending to prove a fact is sufficient to warrant an instruction as to the law on that fact. It matters not whether such evidence be merely inferential, or so slight and shadowy as not to warrant or support a verdict, it will warrant an instruction. Hence, if requested, the trial judge must instruct as to the legal effect of a fact should the jury deem it established, even while he knows that should the jury find that fact to be established and apply his law thereto, it will be his duty to set their verdict aside and grant the new trial which he invites by granting the instruction; and the appellate court, which will overrule him if he lets the verdict stand, will also overrule him if he refuses to grant the instruction rendering such verdict possible.¹

In West Virginia, however, the contrary is the rule, and the trial court need not give instructions as to an hypothesis supported by some evidence, but where the weight of evidence against such hypothesis is so strong that the court would be compelled to set aside a verdict based upon such hypothesis as contrary to the weight of the evidence.²

These two dangers, and which, if either exist, frequently reduce trial courts to the choice of erring by granting a correct but "abstract" instruction, or by refusing to grant a correct instruction applicable to the evidence, as, in the end, the law of "the chancellor's foot" deter-

¹ *R. R. Co. v. Wilcox*, 7 Va. Law Reg. 381; *Jones v. Morris*, 97 Va. 43; *R. R. Co. v. Lacey*, 94 Va. 460.

² *Bloyd v. Pollocks*, 27 W. Va. 75.

mines whether or not the law embodied in the instruction was abstract, and the decisions in both States show a difference in the size of the foot at different periods.

It is believed that the profession generally regard it as the duty of counsel on respective sides of an action to ask and obtain, if possible, instructions clearly and strongly presenting the law applicable to their theory of the case and the evidence adduced in support thereof, and that they may safely leave it to opposing counsel to ask instructions defining and emphasizing the adversary theory and evidence. Whatever may be the rule on this point in Virginia or elsewhere, the doctrine has grown in West Virginia until it is now well settled, that where there is a conflict of evidence, there being testimony on one side to support one theory and testimony on the other side to support another and conflicting theory, and the principles of law applicable to each theory are different, it is error for the court to give an instruction to the jury applicable only to the theory of the party asking it and ignoring the law applicable to the conflicting theory in the case and the evidence tending to support it. In other words, the practical effect is that instructions must be complete in themselves and correct in themselves on the facts of the case. Nor can an instruction bad in this respect be made good by other instructions given on behalf of either party.¹ The cases announcing this rule are practically all cases where the plaintiff claimed negligence of the defendant giving rise to an actionable injury, and the defence was contributory negligence. Here it is held that instructions given on behalf of the plaintiff, that if negligence of the defendant caused the injury a right of recovery exists, must also in the same instruction define or negative contributory negligence of the plaintiff, if there is any evidence tending to show such contributory negligence. And the West Virginia court has refused to limit this rule, as they were urged by counsel in the case of *Webb v. Packet Co.*, 43 W. Va. 800, to those cases where some evidence tending to show contributory negligence appeared from the plaintiff's own showing,² in other words to so limit it as to require the plaintiff to ask instructions on all phases of the case presented by his own evidence, favorable or unfavorable, and to leave the defendant to instruct as to defences presented by his evidence.

¹ *McCreery v. R. R. Co.*, 43 W. Va. 110, and 6 W. Va. ca. ci.

² *McVey v. St. Clair Co.* (W. Va.), 38 S. E. 638; *McCreery v. R. R. Co.*, 43 W. Va. 110; *Woodsell v. Improvement Co.*, 38 W. Va. 23; *McKelvey v. R. R. Co.*, 35 W. Va. 500; *McMehen v. McMehen*, 17 W. Va. 683, *Mason v. Bridge Co.*, 20 W. Va. 223; *Hall v. Lyons*, 29 W. Va. 420; *Webb v. Packet Co.*, 43 W. Va. 800. And see *Richmond v. Leaker* (Va.), 6 Va. Law Reg. 680, 685.

But while the decisions holding instructions of the plaintiff erroneous for failing to cover or consider conflicting theories or evidence of the defence are most frequently cases of negligence on the one hand and contributory negligence on the other, the rule is not limited to such cases. Thus, in ejectionment, where adverse possession was relied upon, an instruction as to the right to recover which ignores its effect is error.¹ In this case, although the opinion does not expressly show that fact, it is a very safe inference that an instruction as to the effect of adverse possession was in the record. And, in *Ward v. Ward*, 47 W. Va. 768, in an action for defamatory words, an instruction that "if defendant uttered any or all of the slanderous words charged in the declaration, maliciously intending to damage the plaintiff in his trade, profession, or occupation, and the said plaintiff was damaged by said utterances, they should find for the plaintiff," was held reversible error for failing to instruct as to the effect of such utterances (which it is to be noted the instruction given required the jury to find to have been made both *maliciously* and with *intent to damage* before they could find for the plaintiff), if made under circumstances deemed privileged in law. Here the defendant had introduced evidence tending to show that the words charged were spoken by him, being himself a heavy creditor of the plaintiff, to other creditors of plaintiff who were consulting with defendant as to plaintiff's solvency.

It is impossible within the scope of an article of this kind to note more than a comparative few of the decisions of our courts on instructions, and to single out from them a few of the grounds with which they are prolific for reversals. There are numerous other phases besides those here mentioned whereby instructions are often exceedingly useful to plaintiffs in error, such as refining and producing conflicting or inconsistent instructions; the time of granting or refusing to grant instructions; their binding and conclusive effect on counsel in argument and on the jury in deliberating and deciding; when, if ever, it is the duty of the court to charge generally; when his duty to charge specially without request; modifications of instructions, etc., etc. It is worth noting, however, it is rarely too late to lay the foundation for future usefulness of instructions, by asking and having a correct instruction refused, as it has been held, at least in criminal cases, that under certain circumstances a correct instruction should be given even after the jury have announced their verdict but before it has been received, and where counsel had refused to ask the same instruction at

¹ *Parkersburg Co. v. Schultz*, 43 W. Va. 481.

an earlier stage when it was suggested to him privately by the court.¹ But the contrary is the rule in civil cases.²

Even from the foregoing, however, it is apparent that when counsel is seeking a reversal and new trial in an appellate court, it is a cheering and a comforting sight to turn in the record to "instructions" and find the bills of exception relating thereto of goodly size. Under such circumstances counsel is apt to exclaim, in the language of that Prince of Pleaders, "My desire is . . . that mine adversary had written a book."

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PROCEEDINGS AGAINST ABSCONDING JUDGMENT-DEBTOR.

The usual method of proceeding against debtors of this class seems to be under section 3606 of the Code, by which provision is made for the arrest of judgment-debtors about to quit the State, and from this common and exclusive usage the opinion seems generally to prevail that there is no other method that can be employed to enforce a claim already reduced to judgment against the judgment-debtor. Section 3606 reads as follows:

"Where a debtor named in a writ of *feri facias*, after being served with summons issued by a commissioner, fails, within the time prescribed therein, to file answers upon oath to said interrogatories, or shall file answers which are deemed by the commissioner to be evasive, if the judgment-creditor show, by affidavit, to the satisfaction of the commissioner, that there is probable cause for believing that the said debtor is about to quit this State, unless he be forthwith apprehended, a writ shall be issued by the commissioner, directed to the sheriff of any county or the sergeant of any corporation, requiring such sheriff or sergeant to take the debtor and keep him safely until such answers to the interrogatories as the commissioner deems proper shall be filed, and such conveyance and delivery as he deems proper shall be made, or until a circuit or corporation court, or a judge of such court in vacation, shall direct the debtor's discharge."

The perils and pitfalls to which the creditor becomes liable while proceeding under this section, since the amendments of sections 3603 and 3604, Acts of 1897-98, p. 503, which must be read in this connection, are pointed out in an article in 6 Va. Law Register, 804, by

¹ State v. Cobbs, 40 W. Va. 718. See also Gibson's Case, 2 Va. Cas. 70; Sledd's Case, 19 Gratt. 813; State v. Davis, 31 W. Va. 390.

² Jarret v. Stevens, 36 W. Va. 445; Tully v. Despard, 31 W. Va. 973.